

**CENTRAL PUGET SOUND  
GROWTH MANAGEMENT HEARINGS BOARD  
STATE OF WASHINGTON**

SAVE OUR SEPARATORS (SOS);	)	
THOMAS AND MARY WILLIAMS;	)	
PATRICIA HORN; BRUCE BURNS; and	)	<b>Case No. 04-3-0019</b>
RON NOVAK,	)	
	)	<b>(SOS)</b>
Petitioners,	)	
	)	<b>ORDER ON MOTIONS</b>
v.	)	
	)	
CITY OF KENT,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
KENT 160 LLC,	)	
	)	
Intervenor.	)	
_____	)	

**I. PROCEDURAL HISTORY<sup>1</sup>**

On June 23, 2004, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Save Our Separators, *et al.*, (**Petitioners** or **SOS**), with two (2) Attachments. The matter was assigned Case No. 04-3-0019. Petitioners challenge the City of Kent's (**Respondent** or the **City**) adoption of Ordinance No. 3685 (the **Ordinance**), "An Ordinance... relating to and implementing comprehensive plan and zoning designations for the Impoundment reservoir property located at the northwest corner of the intersection of 124<sup>th</sup> Avenue Southeast and South 304<sup>th</sup> Street." The basis for the challenge is noncompliance with the Growth Management Act (**GMA** or the **Act**) and the State Environmental Policy Act (**SEPA**). Petitioners request that the Board find the Ordinance noncompliant with the GMA, remand the Ordinance to the City, require the preparation of a Supplemental Environmental Impact Statement (**SEIS**), and require that the City reconsider its action either through an "area wide" planning process or through a quasi-judicial zoning process.

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<sup>1</sup> See Attachment – A, below, for more complete chronological procedural history.

On July 6, 2004, the Board received a Notice of Appearance from counsel for The City of Kent.

On July 6, 2004, the Board issued a Notice of Hearing (**NOH**) setting a Prehearing Conference on this matter for 10:00 a.m. August 2, 2004 and, among other things, establishing July 23, 2004 as the deadline for Petitioners to submit a restatement of the legal issues presented in the PFR.

On July 22, 2004, the Board received correspondence from Petitioners requesting an extension of the deadline for Petitioners' Re-Statement of Legal Issues to July 28, 2004 (**Request for Extension**).

On July 23, 2004, the Board issued an Order Extending Time for Restatement of Issues, extending the deadline for the restatement to July 28, 2004.

On July 23, 2004, the Board received Respondent's Index of Documents (**Index**).

On July 27, 2004, the Board received Petitioners' Re-Statement of Legal Issues (**Restatement of Issues**).

On July 28, 2004, the Board received Amended Petitioners' Re-Statement of Legal Issues (**Amended Restatement of Issues**).

On July 29, 2004, the Board received Stipulation and Order for Intervention of Right by Kent 160 LLC (**Stipulation for Intervention**).

On August 2, 2004, the Board conducted the prehearing conference in this matter in the Training Center, 24<sup>th</sup> Floor, Union Bank of California Center, 900 4<sup>th</sup> Avenue, Seattle. Present for the Board were Margaret Pageler and Bruce C. Laing, presiding officer. Ron Novak represented the Petitioners, *pro se*. Michael C. Walter and Kim Adams Pratt represented the City. Also present was Richard R. Wilson representing Kent 160 LLC, proposed Intervenor in the Stipulation for Intervention. The parties affirmed their stipulation for the proposed Intervention. The Board made an oral ruling granting the intervention and indicating a written ruling would be included in the Prehearing Order (**PHO**).

On August 9, 2004, the Board issued a Pre-hearing Order and Order on Intervention (**PHO**) setting forth the final schedule for this case and the Legal Issues<sup>2</sup> to be addressed.

On August 13, 2004, the Board received Respondent's Amended Index (**Amended Index**).

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<sup>2</sup> See Attachment – B below for the Legal Issues listed in the PHO.

## **II. MOTIONS TO SUPPLEMENT**

### **A. Background**

On August 16, 2004, the Board received Petitioners' Motion to Supplement the Record (**Petitioners' Motion to Supplement**) with four attachments.

On August 16, 2004, the Board received Respondent City of Kent's Motion to Supplement the Record to Include Superior Court LUPA<sup>3</sup> Order (**City's Motion to Supplement**), together with Declaration of Michael C. Walter in Support of Kent's Motion to Supplement the Record (**Walter Declaration**) with two attachments.

On August 16, 2004, the Board received Kent 160 LLC's Motions for Partial Summary Judgment (**Intervenor's Motion to Dismiss**) and to Supplement the Record (**Intervenor's Motion to Supplement**) with two attachments, together with Declaration of Richard R. Wilson in Support of Kent LLC's Motion for Summary Judgment and to Supplement the Record (**Wilson Declaration**).

On August 27, 2004, the Board received Respondent's Submittal of Core Documents consisting of the following 17 documents: City of Kent Ordinance No. 3685 (**Core Doc. No. 1**); City of Kent Comprehensive Plan, adopted April 18, 1995 (**Core Doc. No. 2**); King County Countywide Planning Policies, December 2003 (**Core Doc. No. 3**); Kent City Code – Title 15 (**Core Doc. No. 4**); And the following documents listed in the Amended Index: No. 1 – No. 6; No. 55; No. 123 – No. 127; and No. 135.

On August 30, 2004, the Board received Respondent City of Kent's Response to Petitioner's Motion to Supplement the Record (**City's Response to Petitioners' Motion to Supplement**); the Declaration of Fred Satterstrom in Support of the City of Kent's Opposition to Petitioners' Motion to Supplement the Record (**Satterstrom Declaration**); and the declaration of Brenda Jacober in Opposition to Petitioners' Motion to Supplement (**Jacobser Declaration**).

On August 30, 2004, the Board received Kent 160 LLC's Joinder in Respondent City of Kent's Response to Petitioners' Motion to Supplement the Record (**Intervenor's Joinder in City's Response to Petitioners' Motion to Supplement**).

On August 30, 2004, the Board received Kent 160 LLC's Renewed Motion for Leave to Substitute Executed LUPA Order of Dismissal (**Intervenor's Motion to Substitute Executed LUPA Order**), together with Declaration of Richard R. Wilson in Support of Kent 160 LLC's renewed Motion for Leave to Substitute Executed LUPA Order of Dismissal (**Second Wilson Declaration**).

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<sup>3</sup> Ch. 36.70C RCW, The Land Use Petition Act (**LUPA**)

On August 31, 2004 the Board received Respondent City of Kent's Renewed Request to Substitute Executed LUPA Order of Dismissal (**City's Motion to Substitute Executed LUPA Order**) together with Supplemental Declaration of Michael C. Walter in support of City of Kent's Renewed Request to Substitute Executed LUPA Order (**Second Walter Declaration**).

On September 7, 2004 the Board received Petitioner SOS's Rebuttal to Respondent City of Kent's Response to Petitioner's Motion to Supplement the Record (**Petitioners' Reply to City's Response to Petitioners' Motion to Supplement**).

## **B. Discussion**

Petitioners have moved the record be supplemented with two documents 1. "...the Summary Appraisal Report, City of Kent Impoundment Reservoir as of January 31, 2003, transmitted from Eastman Company to Jerry McCaughan, Property Manager, City of Kent, via letter dated February 22, 2003" (**Appraisal Report**); 2. "...the Published text of U.S. Supreme Court Case No. 94-859, Babbitt v. Sweet Home Chapter of Communities for a Great Oregon'." (**U.S. Supreme Court Decision**). In response, the City moved the Board deny Petitioners' motion on both documents. Intervenor joined the City's response opposing the supplementation. Petitioners replied.

The City and Intervenor have each moved the record be supplemented with "Order Granting City of Kent's and Kent 160 LLC's Motion to Dismiss LUPA Petition with Prejudice" – King County Superior Court Cause No. 04-2-32158-1 (**Superior Court Executed LUPA Order**). Intervenor also requested the Board to take official notice of the City's critical area regulations and their dates of adoption as set forth in Kent Municipal Code (**KMC**) ch. 11.05 (wetlands management), ch. 14.09 (flood hazard regulations), and KMC sections 15.08.220, .222, and .224 (water quality and hazard area development regulations) (**Kent Critical Area Regulations**). Petitioners did not respond to these motions.

The Appraisal Report may have been exempt from public inspection and copying under the provisions of RCW 42.17.310(1)(g), but the City disclosed the document to the public by placing a copy in a file which it made available to the public. Members of the public have the report. Regarding the U.S. Supreme Court Decision, the Superior Court Executed LUPA Order and Kent Critical Area Regulations, WAC 242-02-660 provides that a board may officially note, among other things, decisions of federal courts, decisions of Washington State courts and ordinances of Washington State cities.

## **C. Order on Motions to Supplement**

The parties are cautioned that **each exhibit must be relevant** to the issues before the Board. Its listing on the Index as a part of the record below, or its admission as a supplemental exhibit, does not necessarily mean that a specific exhibit is relevant to the legal issues, as set forth in the PHO.

**The items included in the Record, as discussed supra and noted in the summary table below, have been determined to be necessary or may be of substantial assistance to the Board in reaching its decision.**

In the summary table below:

- “Admitted” means the proposed exhibit becomes a supplemental exhibit. Each new exhibit is assigned an Exhibit No.
- “Board takes official notice” means that the Board recognizes the existence of a decision, order, statute, ordinance, resolution or document adopted by such instrument. Each is assigned an Exhibit No.

<b>Proposed Exhibit: Documents</b>	<b>Ruling</b>
1. Appraisal Report	<b>Admitted</b> – Supplemental Exhibit No. 1
2. U.S Supreme Court Decision <sup>4</sup>	<b>Board Takes Official Notice</b> – Supplemental Exhibit No. 2
3. Superior Court Executed LUPA Order	<b>Board Takes Official Notice</b> – Supplemental Exhibit No. 3
4. Kent Critical Area Regulations	<b>Board Takes Official Notice</b> – Supplemental Exhibit No. 4

The Record for CPSGMHB Case No. 04-3-0019 consists of the **core documents** from the List of Core Documents; the items listed in City’s Amended Index of the Record; and the items included in the Record as noted in the summary table above. These documents constitute the Record to this proceeding. Each exhibit filed with the Board shall reference the document numbers as indicated in the Index or as specified above. Exhibits shall be filed with briefs. PHO, Section VII.

### **III. MOTIONS TO DISMISS**

#### **A. Background**

On August 16, 2004, the Board received Respondent City of Kent’s Motion to Dismiss Petitioners’ Legal Issues 3, 6, 8, 10 – 14, 16 – 18, and 20 – 22 (**City’s Motion to Dismiss**) with six attachments.

On August 16, 2004, the Board received Kent 160 LLC’s Motion for Partial Summary Judgment (**Intervenor’s Motion to Dismiss**) and to Supplement the Record (**Intervenor’s Motion to Supplement**) with eleven attachments, together with Declaration of Richard R. Wilson in Support of Kent LLC’s Motions for Summary Judgment and to Supplement the Record (**Wilson Declaration**).

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<sup>4</sup> Petitioners shall attach to their prehearing brief a copy of the final U. S. Supreme Court Decision.

On August 30, 2004, the Board received SOS Response to Respondent City of Kent's Motion to Dismiss Petitioners' Legal Issues 3, 6, 8, 10 – 14, 16 – 18, and 20 – 22 (**Petitioners' Response to City's Motion to Dismiss**).

On August 30, 2004, the Board received SOS Response to Kent 160 LLC's Motion for Partial Summary Judgment (**Petitioners' Response to Intervenor's Motion to Dismiss**).

On September 7, 2004, the Board received City of Kent's Reply to Petitioners' Response to City's Motion to Dismiss Legal Issues 3, 6, 8, 10 – 14, 16 – 18, and 20 – 22 (**City's Reply to Petitioners' Response to City's Motion to Dismiss**).

### **B. Prefatory Note**

The 22 Legal Issues posed by the Petitioners are set forth in the PHO and in Attachment B to this Order.

The City has submitted a motion to dismiss 14 Legal Issues: Nos. 3, 6, 8, 10 – 14, 16 – 18, and 20 – 22. To support its motion, the City includes six attachments: 1) Petitioners' Petition for Review with Exhibits; 2) City of Kent Addendum to the Kent Comprehensive Plan Environmental Impact Statement (#ENV-93-51); 3) cover page of the City of Kent Comprehensive Plan Draft Environmental Impact Statement July 1994; 4) cover page of the City of Kent Comprehensive Plan Final Environmental Impact Statement, January 1995; 5) cover page of the City of Kent Comprehensive Plan adopted April 18, 1995; and 6) adoption of Existing Environmental Documents dated January 16, 2004. In addition to these attachments, the City relies on the following evidence: 1) Proposed Order on LUPA Motion to Dismiss, 2) Pleadings and other documents on file under Case No. 04-3-0019.

The Intervenor has submitted a motion to dismiss 10 Legal Issues: No.'s 3, 6, 10 – 14, 16, 17, and 22. To support its motion, the Intervenor includes eleven attachments: 1) City of Kent's Ordinance 3685; 2) legal description of property affected by Ordinance 3685; 3) Comprehensive Plan Designation and Zoning District Designation maps of property affected by Ordinance 3685; 4) City of Kent, City Code Chapter 11.05 Wetlands Management; 5) City of Kent, City Code Chapter 14.09 Flood Hazard Regulations; 6) City of Kent, City Code Chapter 15.08 General and Supplementary Provisions; 7) Declaration of Richard R. Wilson in support of Kent 160 LLC's motion; 8) letter to King County Superior Court Judge Middaugh from Keating, Bucklin & McCormack, dated August 5, 2004; 9) Proposed Order Granting Motion to Dismiss Petitioner's LUPA Petition; 10) Declaration of Michael C. Walter in support of Kent 160 LLC's motion to supplement; and 11) Revised Proposed Order Granting Motion to Dismiss Petitioner's LUPA Petition.

The Board will address the Motions to Dismiss in the following sequence and groupings of issues: assertions that issues are time barred and/or Board lacks jurisdiction (Issues 10 – 14); assertions related to LUPA (Issues 16 and 17); assertions related to

Countywide Planning Policies (Issues 3 and 6); assertions that issues are duplicative or redundant (Issues 8, 11, 17, 20 and 22); and assertions regarding SEPA issues (Issues 18, 20, and 21).

### C. Jurisdiction and Timeliness Issues

#### Legal Issues 10, 11, 12, and 13<sup>5</sup>.

##### a. Position of the Parties

In regards to Legal Issues 10 and 11, the City argues that RCW 36.70A.172(1) does not require cities to adopt ‘policies’ to protect critical areas, as alleged by the Petitioners, and that this was affirmed by the Washington Court of Appeals, Division 1, in *HEAL v. CPSGMHB*.<sup>6</sup> City’s Motion to Dismiss at 13, 16. In regards to Legal Issue 12 and 13, though RCW 36.70A.060 and 36.70A.170 do require that a City designate critical areas and adopt development regulations which protect these areas, the City asserts that the GMA imposes no special duty on the City to adopt critical area regulations on a parcel-by-parcel approach, but rather on a municipality-wide application basis. *Id.* at 14-16. Since Ordinance 3685 does not enact any new policies or critical area development regulations, the City argues that the Board has no jurisdiction. *Id.*

The City further argues that though it was not required to adopt ‘policies’ to protect critical areas, that between 1993 and 2002 the City of Kent did adopt development regulations to protect these areas. *Id.* Since the Petitioners were required to file a Petition for Review within 60 days of enactment of these development regulations, and they did not file within that time parameter, the City concludes that Legal Issues 10, 11, 12, and 13 are time barred. *Id.*

The Intervenor alleges that although the GMA mandates adoption of city-wide critical area regulations, it does not impose an additional duty to adopt particularized regulations

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<sup>5</sup> Legal Issue 10 Does the City of Kent’s adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 fail to comply with RCW 36.70A.172 because it failed to include the best available science in determining its land use and zoning designation for the land affected by Ordinance 3685?

Legal Issue 11 Does the City of Kent’s adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 fail to comply with RCW 36.70A.172 because it failed to give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries in determining its land use and zoning designation for the land affected by Ordinance 3685?

Legal Issue 12 Does the City of Kent’s adoption of the amendment to its Comprehensive Plan accomplished through ordinance 3685 fail to comply with RCW 36.70A.170 because the City of Kent failed to designate critical areas on the land affected by ordinance 3685?

Legal Issue 13 Does the City of Kent’s adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 fail to comply with RCW 36.70A.060 because the City of Kent’s development regulations do not protect critical areas on the land affected by Ordinance 3685?

<sup>6</sup> *HEAL v. CPSGMHB*, 96 Wn. App. 522, 527-528, 979 P.2d 864 (1999).

as part of a city's comprehensive plan and zoning designation. Intervenor's Motion to Dismiss at 7-8. Intervenor argues that the City did comply with the GMA's requirement to enact critical area regulations for application throughout a municipality, and that this was accomplished long ago. *Id.*

Like the City, the Intervenor asserts that since the required critical area regulations were enacted between 1993 and 2002, the Petitioners were required to file a Petition for Review within 60 days of the enactment of those regulations, with the latest date for filing being two years ago. The claims are therefore time barred. *Id.*

In its response, the Petitioners state that both of these issues are clearly within the regulatory language of the GMA and therefore the Board has jurisdiction. Petitioners' Response to City's Motion to Dismiss at 2; Petitioners' Response to Intervenor's Motion to Dismiss at 2. The Petitioners do not provide any countering arguments to the City and the Intervenor's claim that the GMA does not apply to policy decisions. However, the Petitioners do assert that the issues are not time barred because Petitioners are seeking decisions regarding actions taken by the City in 2003 and 2004, not for any actions that the City did or did not perform in years prior. *Id.*

In reply, the City notes that Petitioners have provided no legal authority or analysis challenging the City's contention that the Board lacks jurisdiction or that the issues are time barred but rather Petitioners only provide what the City calls "unexplained and self-serving statements." City's Reply to Petitioners' Response to City's Motion to Dismiss at 4-5. In addition, the City reiterated its argument that the critical areas and development regulations which the Petitioners challenge were enacted years ago and are therefore well outside of the 60-day statutory window allowed for such a challenge. *Id.*

The Intervenor did not reply to Petitioners' response.

#### b. Applicable Law

RCW 36.70A.060 provides in pertinent part:

...

(2) Each county and city shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170. For counties and cities that are required or choose to plan under RCW 36.70A.040, such development regulations shall be adopted on or before September 1, 1991. For the remainder of the counties and cities, such development regulations shall be adopted on or before March 1, 1992.

(3) Such counties and cities shall review these designations and development regulations when adopting their comprehensive plans under RCW 36.70A.040 and implementing development regulations under RCW



36.70A.120 and may alter such designations and development regulations to insure consistency.

...

RCW 36.70A.170(1)(d) provides:

- (1) On or before September 1, 1991, each county, and each city, shall designate where appropriate:
  - (d) Critical areas.

RCW 36.70A.172(1) provides

- (1) In designating and protecting critical areas under this chapter, counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas. In addition, counties and cities shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.

#### c. Discussion

In previous cases the Board has made determinations related to the critical areas provisions of GMA, including the following:

The critical area scheme set out by the GMA for [jurisdictions] is: (1) designate critical areas by September 1, 1991; (2) adopt development regulations to protect these designated critical areas by September 1, 1991; and (3) when adopting a comprehensive plan by the July 1, 1994 deadline, review the critical area designations and protective development regulations. In other words, the requirement of RCW 36.70A.060(3) applies to the adoption of the initial comprehensive plan required by RCW 36.70A.040; nothing in RCW 36.70A.060(3) creates a duty for the [jurisdiction] to review its critical area designations and development regulations upon adoption of a subsequent subarea plan.

*Tulalip Tribes of Washington v. City of Monroe*, CPSGMHB Case No. 99-3-0013, FDO, (Jan. 28, 2000), at 10.

Amendments to a previously adopted critical areas ordinance, after the effective date of a legislative amendment (BAS – RCW 36.70A.172) of the GMA, are subject to the best available science requirement of RCW 36.70A.172(1).

*Honesty in Environmental Analysis and Legislation (HEAL) v. City of Seattle*, CPSGMHB Case No. 96-3-0012, FDO, (Aug. 21, 1996), at 17.

In the HEAL FDO, cited above, the Board also found “RCW 36.70A.172 does not impose a requirement that cities and counties adopt policies to protect critical areas; therefore, the Board does not have jurisdiction to hear an appeal of the City’s resolution adopting such policies.” On appeal, the Court of Appeals agreed that RCW.36.70A.172 does not require that a city adopt policies to protect critical areas but, if a city does adopt such policies, the city must comply with RCW 36.70A.172 and the Board would have jurisdiction.<sup>7</sup>

In this case the City adopted and amended critical area regulations during the period between 1993 and 2002.<sup>8</sup> These regulations apply to the entire City including the area involved in Ordinance 3685. The Ordinance does not adopt nor amend the City’s critical area regulations. The time period under GMA for challenging the compliance of the City’s existing critical area regulations with the provisions of RCW 36.70A.060, .170 and .172 has expired.<sup>9</sup>

#### d. Conclusions

Issues 10, 11, 12 and 13 are time barred and are therefore **dismissed**.

#### Legal Issue 14<sup>10</sup>.

##### a. Position of the Parties

The City and the Intervenor both argue that the Board lacks jurisdiction on this Legal Issue because Ordinance 3685 did not amend or otherwise involve the City of Kent’s capital facilities element or plan. City’s Motion to Dismiss at 17 and Intervenor’s Motion to Dismiss at 9. Both the City and the Intervenor acknowledge that RCW 36.70A.150 requires a city to identify lands useful for public purposes (LUPPs) and that this duty is imposed at the time when a city develops its Comprehensive Plan, not when it adopts individual plan amendments. *Id.*

In addition, both the City and the Intervenor argue that since the City’s Comprehensive Plan was enacted in 1994-95, the appropriate time to challenge the identification of LUPPs was in 1994-95. City’s Motion to Dismiss, at 17-18 and Intervenor’s Motion to

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<sup>7</sup> HEAL v. CPSGMHB, 96 Wn. App. 522, 979 P.2d 864 (1999).

<sup>8</sup> See Supplemental Exhibit No. 4.

<sup>9</sup> The Board notes the review of comprehensive land use plans and development regulations required under RCW 36.70A.130(1) includes consideration of critical area ordinances. The time period for such review is specified in RCW 36.70A.130(4).

<sup>10</sup> Legal Issue 14 Does the City of Kent’s adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 fail to comply with RCW 36.70A.150 because the City of Kent failed to consider the land affected by Ordinance 3685 as useful for public purposes?

Dismiss at 9-10. Petitioners, therefore, are beyond the 60 day time limitation for filing grievances on this issue. *Id.*

In response, the Petitioners asserts that the issue is not time barred because Petitioners are seeking a decision regarding actions taken by the City in 2003 and 2004, not for any actions that the City did or did not perform in years prior. Petitioners' Response to City's Motion to Dismiss at 2 and Petitioners' Response to Intervenor's Motion to Dismiss at 2. In addition, the Petitioners state that this issue is within the jurisdiction of the Board because it is clearly stated within the context of the GMA regulatory language. *Id.*

In reply, the City reasserts its position that Ordinance 3685 does not amend or otherwise involve a capital facilities element or plan. City's Reply to Petitioners' Response to City's Motion to Dismiss, at 5. The City also argues that Petitioners have offered no legal authority to support their claim and no analysis challenging the City's contentions. *Id.*

The Intervenor did not reply to Petitioners' response.

#### b. Applicable Law

RCW 36.70A.150 provides:

Each county and city that is required or chooses to prepare a comprehensive land use plan under RCW 36.70A.040 shall identify lands useful for public purposes such as utility corridors, transportation corridors, landfills, sewage treatment facilities, storm water management facilities, recreation, schools, and other public uses. The county shall work with the state and the cities within its borders to identify areas of shared need for public facilities. The jurisdictions within the county shall prepare a prioritized list of lands necessary for the identified public uses including an estimated date by which the acquisition will be needed.

The respective capital acquisition budgets for each jurisdiction shall reflect the jointly agreed upon priorities and time schedule.

#### c. Discussion

The identification of lands useful for public purposes under RCW 36.70A.150 is a process required to be completed by the time of adoption of the comprehensive plan not at the time of individual plan amendments.<sup>11</sup> The City's Comprehensive Plan was adopted on April 18, 1995. Core Doc. No. 2. The City declared the impound reservoir site surplus to the City's needs on October 21, 2003. Ord. 3685, at 2. Ordinance 3685 does not amend the capital facilities element of the City's Comprehensive Plan. Under

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<sup>11</sup> *Sky Valley, et al. v. Snohomish County*, CPSGMHB Case No. 95-3-0068c, FDO, (Mar. 12, 1996) at 62.

the GMA, the timeframes for challenging the City's compliance with the provisions RCW 36.70A.150 have expired.<sup>12</sup>

d. Conclusions

Issue 14 is time barred and is therefore **dismissed**.

**D. LUPA Issues**

Here, the City and the Intervenor seek to dismiss Legal Issue 16.<sup>13</sup> The City and the Intervenor assert that since the King County Superior Court, in a LUPA action, found that the enactment of Ordinance 3685 was a legislative action, the Board has no jurisdiction. In addition, the City seeks to dismiss Legal Issue 17<sup>14</sup> as duplicative of Legal Issue 16.

Legal Issues 16 and 17

a. Position of the Parties

The City argues that the GMA recognizes a distinction between project review and comprehensive land use planning. City's Motion to Dismiss, at 18. The City notes that the Board has previously held, in *Andrus v City of Bainbridge Island*<sup>15</sup>, that a legislative action involving comprehensive land use planning is not a project review subject to RCW 36.70B. *Id.* In addition, the City argues that the Board should take official notice of the findings of the King County Superior Court in Petitioners' LUPA action. *Id.*, at 19. In the LUPA action, the court dismissed the case, in part, on a finding that the enactment of Ordinance 3685 was a legislative action. *Id.*, at 18. In addition, the City argues that Legal Issue 17 is duplicative of Legal Issue 16, and therefore, that it should be dismissed under the same reasoning as Legal Issue 16. City's Motion to Dismiss, at 10.

The Intervenor's arguments are similar to those of the City, alleging that the actions taken in Ordinance 3685 were legislative and that this fact has been judicially determined in Superior Court. Intervenor's Motion to Dismiss, at 11. Intervenor further asserts that since this issue was litigated in the LUPA action that was recently dismissed by the court, that the Doctrine of Collateral Estoppel bars the relitigation of this issue. *Id.* The

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<sup>12</sup> The Board notes that periodic review of comprehensive land use plans and development regulations is required under RCW 36.70A.130(1). The time period for such review is specified in RCW 36.70A.130(4).

<sup>13</sup> Legal Issue 16 Did the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 fail to comply with RCW 36.70A.470 because the action had the characteristics of a project review, was not docketed, and should have been considered under RCW 36.70B?

<sup>14</sup> Legal Issue 17 Did the City of Kent's adoption of zoning accomplished through Ordinance 3685 fail to comply with RCW 36.70A.470 because the action had the characteristics of project review rezone, was not docketed, and should have been considered under RCW 36.70B?

<sup>15</sup> *Andrus v City of Bainbridge Island*, CPSGMHB Case No. 98-3-0030, FDO, (Mar. 31, 1999), at 10

Intervenor argues that all four parts of the doctrine's requirements have been met and therefore the Board must accept the finding of the Superior Court that Ordinance 3685 was a legislative act. *Id.* Like the City, the Intervenor cites *Andrus* as dispositive for this legal issue. *Id.*, at 12.

In response to both the City and the Intervenor, Petitioners do not directly respond to the arguments presented in regards to Legal Issue 16. Rather Petitioners assert that the issue is within the scope of the GMA and that the Petitioners have the right to present arguments for each Legal Issue over which the Board has jurisdiction. Petitioners' Response to City's Motion to Dismiss, at 2-3 and Petitioners' Response to Intervenor's Motion to Dismiss, at 3.

In reply, the City reiterates its position that the action taken by the City was legislative and did not involve a project review. City's Reply to Petitioners' Response to City's Motion to Dismiss, at 6. In addition, the City once again noted that Petitioners' recently dismissed LUPA action in Superior Court held the action to be legislative and that the Board's previous holdings, as in *Andrus*, supports the City's position for dismissal. *Id.*

#### b. Applicable Law

RCW 36.70A.470 provides:

(1) Project review, which shall be conducted pursuant to the provisions of chapter 36.70B RCW, shall be used to make individual project decisions, not land use planning decisions. If, during project review, a county or city planning under RCW 36.70A.040 identifies deficiencies in plans or regulations:

(a) The permitting process shall not be used as a comprehensive planning process;

(b) Project review shall continue; and

(c) The identified deficiencies shall be docketed for possible future plan or development regulation amendments.

(2) Each county and city planning under RCW 36.70A.040 shall include in its development regulations a procedure for any interested person, including applicants, citizens, hearing examiners, and staff of other agencies, to suggest plan or development regulation amendments. The suggested amendments shall be docketed and considered on at least an annual basis, consistent with the provisions of RCW 36.70A.130.

(3) For purposes of this section, a deficiency in a comprehensive plan or

development regulation refers to the absence of required or potentially desirable contents of a comprehensive plan or development regulation. It does not refer to whether a development regulation addresses a project's probable specific adverse environmental impacts which the permitting agency could mitigate in the normal project review process.

(4) For purposes of this section, docketing refers to compiling and maintaining a list of suggested changes to the comprehensive plan or development regulations in a manner that will ensure such suggested changes will be considered by the county or city and will be available for review by the public.

#### c. Discussion

Petitioners Issues 16 and 17 are based on the premise that Ordinance 3685 does not comply with RCW 36.70A.470 because the action had the characteristics of a project review and should have been considered under RCW 36.70B. The title of Ordinance 3685 and the text of the ordinance make it clear that the action taken was the adoption of comprehensive plan designations and related zoning designations for the subject area rather than a project review of a proposed development. King County Superior Court recently issued an Order dated August 16, 2004 containing the following finding: "The actions taken and decision of the City of Kent which Petitioners are attempting to appeal in their Land Use Petition Act appeal, *i.e.*, the enactment of Ordinance No. 3685, are solely legislative actions and decisions, to which the Land Use Petition Act, RCW Ch. 34.70C (*sic*), does not apply. *See*, RCW 36.70C.020." Supplemental Exhibit No. 3, at 3.

#### d. Conclusions

The action taken in Ordinance 3685 was not a project review and did not have the characteristics of a project review. The provisions of RCW 36.70A.470 are not applicable to this Ordinance. Issues 16 and 17 are **dismissed**.

### **E. Countywide Planning Policy Issues**

#### Legal Issues 3 and 6

##### a. Positions of the Parties

##### 1) Regarding Legal Issue 3<sup>16</sup>

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<sup>16</sup> Legal Issue 3 Did the City of Kent's adoption of zoning accomplished through Ordinance 3685 fail to comply with 36.70A.100 because the zoning is inconsistent with the countywide planning policies and adopted land use maps?

The City asserts that RCW 36.70A.100 requires cities and counties to coordinate their comprehensive plans and plan amendments but does not mandate such consultation when making decisions to amend zoning or development regulations. City's Motion to Dismiss, at 11. The City notes that in a previous decision, *FACT v. City of Bellevue*<sup>17</sup>, the Board rejected a claim that 36.70A.100 applies to an ordinance that was a development regulation. *Id.* Due to the distinction between the adoption of zoning and the adoption of a Comprehensive Plan or amendment, the City argues that the coordination requirement of the statutes applies only to the Comprehensive Plan and not to zoning. *Id.*

The Intervenor argues that, by the GMA's own definition, zoning ordinances are development regulations. Intervenor's Motion to Dismiss, at 6. The Intervenor also cites *FACT v. City of Bellevue, supra*, and asserts the position that 36.70A.100's intergovernmental coordination requirement applies only to comprehensive plans. *Id.*

In response to both the City and the Intervenor, Petitioners do not directly respond to the arguments presented in regard to Legal Issue 3. Rather, Petitioners assert that the issue is within the scope of the GMA and that the Petitioners have the right to present arguments for each legal issue for which the Board has jurisdiction. Petitioners' Response to City Motion to Dismiss, at 2-3 and Petitioners' Response to Intervenor's Motion to Dismiss, at 3.

In reply, the City reiterated its position that the coordination requirement of RCW 36.70A.100 applies only to comprehensive plans and plan amendments, and that Petitioners have failed to provide any legal authority or analysis to challenge this contention. City's Reply to Petitioners' Response, at 3.

The Intervenor did not reply to Petitioners' response.

## 2) Regarding Legal Issue 6<sup>18</sup>

The City and Intervenor both argue that this issue should be dismissed because the land affected by the ordinance is located within the incorporated city limits of Kent and is not part of a Potential Annexation Area (PAA). City's Motion to Dismiss, at 12. Intervenor's Motion to Dismiss, at 6. Therefore, the parties assert, any county-wide planning policies pertaining to PAAs do not apply. *Id.*

In response, the Petitioners do not directly respond to the City's or the Intervenor's allegations. Rather, the Petitioners state that the issue is clearly stated within the content of GMA regulatory language and is within the jurisdiction of the Board to hear such a

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<sup>17</sup> *FACT v City of Bellevue*, CPSGMHB Case No. 02-3-0014, FDO, (Mar.17, 2003), at 9.

<sup>18</sup> Legal Issue 6 Does the City of Kent's adoption of zoning accomplished through Ordinance 3685 fail to comply with local county-wide planning policies adopted pursuant to the GMA with regard to potential annexation areas, by having the City of Kent exercise land use control within the Potential Annexation Area for the City of Auburn?

claim. Petitioners' Response to City's Motion to Dismiss, at 2 and Petitioners' response to Intervenor's Motion to Dismiss, at 2.

In reply, the City states that Petitioners failed to provide any legal authority challenging the City's position that the land is not part of a PAA and therefore the City had no obligation to comply with county-wide planning policies regarding PAAs. City's Reply to Petitioners' Response to City's Motion to Dismiss, at 4.

The Intervenor did not reply to Petitioners' response.

b. Applicable Law

RCW 36.70A.100 provides:

The comprehensive plan of each county or city that is adopted pursuant to RCW 36.70A.040 shall be coordinated with, and consistent with, the comprehensive plans adopted pursuant to RCW 36.70A.040 of other counties or cities with which the county or city has, in part, common borders or related regional issues.

RCW 36.70A.210(1) provides:

(1) The legislature recognizes that counties are regional governments within their boundaries, and cities are primary providers of urban governmental services within urban growth areas. For the purposes of this section, a "county-wide planning policy" is a written policy statement or statements used solely for establishing a county-wide framework from which county and city comprehensive plans are developed and adopted pursuant to this chapter. This framework shall ensure that city and county comprehensive plans are consistent as required in RCW 36.70A.100. Nothing in this section shall be construed to alter the land-use powers of cities.

c. Discussion

Countywide planning policies give direction to the Comprehensive Plans of counties and cities rather than to zoning and other development regulations. *City of Snoqualmie and City of Issaquah v. King County*, CPSGMHB Case No. 92-3-0004c, FDO (Mar. 1, 1993), at 16. The consistency required by RCW 36.70A.100 and .210 is between Comprehensive Plans. County-wide planning policies do not speak directly to development regulations. *Id*

The land which is the subject of Ordinance 3685 has been annexed to the City of Kent. Potential Annexation Areas are, by definition, unincorporated areas which have the "potential" to be annexed to a city. The subject area does not have that potential.



#### d. Conclusions

RCW 36.70A.100 does not require the zoning adopted by Ordinance 3685 to be consistent with county-wide planning policies. The land addressed in the ordinance is not part of the Potential Annexation Area of the City of Auburn. Issues 3 and 6 are **dismissed**.

### F. Duplicative Issues

#### Legal Issues 8, 11, 17, 20, and 22<sup>19</sup>

##### a. Position of the Parties

The City asserts that Legal Issues 8, 11, 17, 20 and 22 are all just duplicates, or slightly re-crafted versions of other issues. City's Motion to Dismiss, at 9. The City alleges that Issue 8 is the same as Issue 7, that Issue 11 is the same as Issue 10, that Issue 17 is the same as Issue 16, and that Issue 20 is the same as Issue 19. *Id.* In addition, the City claims that Issue 22 is nothing more than a rephrasing of various issues including 2, 3, 6, 7, and 8. *Id.*

The City notes that the Board's own procedural rules encourage avoidance of duplicative or redundant issues. City's Motion to Dismiss, at 10. The City further notes that Washington Courts have long recognized the value, cost savings, and judicial economy to be served by eliminating or consolidating duplicative legal claims, and in fact, the courts encourage dismissal of such claims. *Id.* For the Board to address the duplicative legal issue, the City asserts, would be a waste of not only the Board's time and resources but that of the parties involved. *Id.*

The Intervenor asserts that Legal Issue 22 is simply a restatement of claims raised in Legal Issues 2, 3, 6, 7, and 8. Intervenor's Motion to Dismiss, at 12. The Intervenor further asserts that even if the Board granted Intervenor's Motion to Dismiss Legal Issues 3 and 6, Petitioners would still be able to present their arguments to the Board with Legal Issues 2, 7, and 8. *Id.*

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<sup>19</sup> Legal Issue 8 Did the City of Kent's adoption of zoning accomplished through Ordinance 3685 fail to comply with RCW 36.70A.130 because the zoning was inconsistent with its Comprehensive Plan and associated development, and development review, regulations?

Legal Issue 20 Did the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 fail to comply with RCW 43.21C.034 because the City of Kent inappropriately relied on prior documents to address environmental issues related to the land use designation affected by Ordinance 3685?

Legal Issue 22 Are Petitioners entitled to a decision from the Board that the comprehensive plan amendment and rezone did not properly apply county-wide planning policies and the City's Comprehensive Plan?

In response to both the City and the Intervenor, Petitioners argue that the Legal Issues are not duplicative but rather provide clear and concise “yes or no” statements as required by the Board. Petitioners’ Response to City’s Motion to Dismiss, at 2 and Petitioners’ Response to Intervenor’s Motion to Dismiss, at 2. Petitioners further assert that no two Legal Issues state the same specific concern of the Petitioners and to dismiss any of these Legal Issues would unfairly restrict the Petitioners. *Id.*

In reply, the City argues that Petitioners’ re-crafted versions of the Legal Issues does not amount to a meaningful difference for which an individual determination by the Board is required because a minor difference would not amount to a difference in decision or outcome of the issue. City’s Reply to Petitioners’ Response to City’s Motion to Dismiss, at 3. In addition, the City reiterated its belief in judicial economy. *Id.*

The Intervenor did not reply to Petitioners’ response.

#### b. Discussion

Legal Issue 11 is addressed in Section III-C above where it is dismissed because it is time barred. Legal Issue 17 is addressed in Section III-D above where it is dismissed because the provisions of RCW 36.70A.470 are not applicable to Ordinance 3685. Because these Legal Issues have been dismissed, they will not be addressed here.

Legal Issue 7 asserts an internal inconsistency between the City’s Comprehensive Plan and the plan amendment enacted by Ordinance 3685. Legal Issue 8 asserts an inconsistency between the Comprehensive Plan and the zoning enacted by the ordinance. Because both actions were accomplished by the same ordinance, they could be addressed in a single issue. However they are not redundant and the Petitioners have chosen to address them separately.

Legal Issue 19 asserts a failure to comply with the provisions of RCW 43.21C.031. Legal Issue 20 asserts failure to comply with RCW 43.21C.034. While Petitioners may have been able to combine these assertions in a single issue, they have chosen to separate them. However, they are not redundant.

Legal Issue 22 asserts inconsistency between the enactments in the ordinance and county-wide planning policies, and between the enactments of the ordinance and the City’s Comprehensive Plan. These assertions are a repetition of more specific assertions contained in Issues 2, 4, 5, 7, and 8. Legal Issue 22 is redundant.

#### c. Conclusions

Issues 8 and 20 are not redundant of other issues and are retained. Issue 22 is redundant of other issues and is hereby **dismissed**.

## **G. SEPA Issues**

### Issues 18, 20, and 21

The Board will not resolve the Motion to Dismiss these Legal Issues until it issues its Final Decision and Order.<sup>20</sup>

The Board questions Petitioners' SEPA standing.<sup>21</sup> Petitioners are hereby directed to address the basis for their SEPA standing in their Prehearing Brief.<sup>22</sup>

## **IV. ORDER ON MOTIONS TO DISMISS**

Based upon review of the Petition for Review, the Prehearing Order, the briefs and materials submitted by the parties, GMA, SEPA and prior decisions of this Board and other Growth Management Hearings Boards, the Board enters the following **Order**:

- Issues 3, 6, 10, 11, 12, 13, 14, 16, 17 and 22, as set forth in the Prehearing Order, are **dismissed**.<sup>23</sup>
- Petitioners shall address the basis for their assertion of SEPA standing in their Prehearing Brief.

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<sup>20</sup> See PHO, at 4.

<sup>21</sup> Challenges to either SEPA or GMA standing before the Board can be brought at any time by either a party or the Board on its own initiative. [*PNO*, 4318, FDO, at 19.]

<sup>22</sup> See: *Leavitt v. Jefferson County*, 74 Wn. App. 668, 875 P.2d 681 (1994) and *Trepanier v. Everett*, 64 Wn. App. 380, 824 P.2d 524, review denied, 119 Wn.2d 1012 (1992); and *WSDP I*, 4316, 4/22/94 Order, at 6-7.

<sup>23</sup> See Attachment – C for list of Issues retained and to be addressed in prehearing briefs.

So ORDERED this 16<sup>th</sup> day of September, 2004.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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Bruce C. Laing, FAICP  
Board Member

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Edward G. McGuire, AICP  
Board Member

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Margaret A. Pageler  
Board Member

Note: This Order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.

## ATTACHMENT - A

### Chronological Procedural History on CPSGMHB Case No. 04-3-0019

On June 23, 2004 the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Save Our Separators, *et al.*, (**Petitioners or SOS**), with two (2) Attachments. The matter was assigned Case No. 04-3-0019. Petitioners challenge the City of Kent's (**Respondent** or the **City**) adoption of Ordinance No. 3685 (the **Ordinance**), "An Ordinance... relating to and implementing comprehensive plan and zoning designations for the Impoundment reservoir property located at the northwest corner of the intersection of 124<sup>th</sup> Avenue Southeast and South 304<sup>th</sup> Street." The basis for the challenge is noncompliance with the Growth Management Act (**GMA** or the **Act**), and the State Environmental Policy Act (**SEPA**). Petitioners requests the Board find the Ordinance non-compliant with the GMA, remand the Ordinance to the City, require the preparation of a Supplemental Environmental Impact Statement (**SEIS**), and require that the City to reconsider its action either through an "area wide" planning process or through a quasi-judicial zoning process.

On July 6, 2004 the Board received a Notice of Appearance from counsel for The City of Kent.

On July 6, 2004 the Board issued a Notice of Hearing (**NOH**) setting a Prehearing Conference on this matter for 10:00 a.m. August 2, 2004 and, among other things, establishing July 23, 2004 as the deadline for Petitioners to submit a restatement of the legal issues presented in the PFR.

On July 22, 2004 the Board received correspondence from Petitioners requesting an extension of the deadline for Petitioners' Re-Statement of Legal Issues to July 28, 2004 (**Request for Extension**).

On July 23, 2004 the Board issued an Order Extending Time for Restatement of Issues extending the deadline for the restatement to July 28, 2004.

On July 23, 2004 the Board received Respondent's Index of Documents (**Index**).

On July 27, 2004 the Board received Petitioners' Re-Statement of Legal Issues (**Restatement of Issues**).

On July 28, 2004 the Board received Amended Petitioners' Re-Statement of Legal Issues (**Amended Restatement of Issues**).

On July 29, 2004 the Board received Stipulation and Order for Intervention of Right by Kent 160 LLC (**Stipulation for Intervention**).

On August 2, 2004, the Board conducted the prehearing conference in this matter in the State Attorney General's Training Center, 24<sup>th</sup> Floor, Union Bank of California Building,

900 4<sup>th</sup> Avenue, Seattle. Present for the Board were Margaret Pageler and Bruce C. Laing, presiding officer. Ron Novak represented the Petitioners, *pro se*. Michael C. Walter and Kim Adams Pratt represented the City.

Also present was Richard R. Wilson representing Kent 160 LLC, proposed Intervenor in the Stipulation for Intervention. The parties stated their stipulation for the proposed Intervention. The Board made an oral ruling granting the intervention and indicating a written ruling would be included in the Prehearing Order (**PHO**).

The Board reviewed its procedures for the Hearing, including the composition and filing of the Index to the Record Below; Exhibit Lists and Supplemental Exhibits; Dispositive Motions; the Legal Issues to be decided; and a Final Schedule of deadlines.

On August 9, 2004 the Board issued a Pre-hearing Order And Order on Intervention (**PHO**) setting forth the final schedule for this case and the Legal Issues to be addressed.

On August 13, 2004 the Board received Respondent's Amended Index (**Amended Index**).

On August 16, 2004 the Board received Petitioners' Motion to Supplement the Record (**Petitioners' Motion to Supplement**) with four attachments.

On August 16, 2004 the Board received Respondent City of Kent's Motion to Supplement the Record to Include Superior Court LUPA Order (**City's Motion to Supplement**), together with Declaration of Michael C. Walter in Support of Respondent City of Kent's Motion to Supplement the Record (**Walter Declaration**) with two attachments.

On August 16, 2004 the Board received Respondent City of Kent's Motion to Dismiss Petitioners' Legal Issues 3, 6, 8, 10 – 14, 16 – 18, and 20 – 22 (**City's Motion to Dismiss**) with six attachments.

On August 16, 2004 the Board received Kent 160 LLC's Motions for partial Summary Judgment (**Intervenor's Motion to Dismiss**) And to Supplement the Record (**Intervenor's Motion to Supplement**) with two attachments, together with Declaration of Richards R. Wilson in Support of Kent LLC's Motions for Summary Judgment And to Supplement the Record (**Wilson Declaration**).

On August 27, 2004 the Board received Respondent's Submittal of Core Documents consisting of the following 17 documents: City of Kent Ordinance No. 3685 (**Core Doc. No. 1**); City of Kent Comprehensive Plan, adopted April 18, 1995 (**Core Doc. No. 2**); King County Countywide Planning Policies, December 2003 (**Core Doc. No. 3**); Kent City Code – Title 15 (**Core Doc. No. 4**); And the following documents listed in the Amended Index: No. 1 – No. 6; No. 55; No. 123 – No. 127; No. 135.

On August 30, 2004 the Board received SOS Response to Respondent City of Kent's Motion to Dismiss Petitioners' Legal Issues 3, 6, 8, 10 – 14, 16 – 18, and 20 – 22 (**Petitioners' Response to City's Motion to Dismiss**).

On August 30, 2004 the Board received SOS Response to Kent 160 LLC's Motion for Partial Summary Judgment (**Petitioners' Response to Intervenor's Motion to Dismiss**).

On August 30, 2004 the Board received Respondent City of Kent's Response to Petitioner's Motion to Supplement the Record (**City's Response to Petitioners' Motion to Supplement**) together with the Declaration of Fred Satterstrom in Support of the City of Kent's Opposition to Petitioners'; Motion to Supplement the Record (**Satterstrom Declaration**) and together with the declaration of Brenda Jacober in Opposition to Petitioners' Motion to Supplement (**Jacobser Declaration**).

On August 30, 2004 the Board received Kent 160 LLC's Joinder in Respondent City of Kent's Response to Petitioners' Motion to Supplement the Record (**Intervenor's Joinder in City's Response to Petitioners' Motion to Supplement**).

On August 30, 2004 the Board received Kent 160 LLC's Renewed Motion for Leave to Substitute Executed LUPA Order of Dismissal (**Intervenor's Motion to Substitute Executed LUPA Order**), together with Declaration of Richard R. Wilson In Support of Kent 160 LLC's renewed Motion for Leave to Substitute Executed LUPA Order of Dismissal (**Second Wilson Declaration**).

On August 31, 2004 the Board received Respondent City of Kent's Renewed Request to Substitute Executed LUPA Order of Dismissal (**City's Motion to Substitute Executed LUPA Order**) together with Supplemental Declaration of Michael C. Walter in support of City of Kent's Renewed Request to Substitute Executed LUPA Order (**Second Walter Declaration**).

On September 7, 2004 the Board received Petitioner SOS's Rebuttal to Respondent City of Kent's Response to Petitioner's Motion to Supplement the Record (**Petitioner's Reply to City's Response to Petitioners' Motion to Supplement**).

On September 7, 2004 the Board received City of Kent's Reply to Petitioners' Response to City's Motion to Dismiss Legal Issues 3, 6, 8, 10 – 14, 16 – 18, and 20 – 22 (City's Reply to Petitioners' to Dismiss Petitioners' Legal Issues 3, 6, 8, 10 – 14, 16 – 18 , and 20 – 22 (**City's Reply to Petitioners' Response to City's Motion to Dismiss**).

On September 16, 2004 the Board issued its Order on Motions for this case.

## **ATTACHMENT – B**

### **Legal Issues Listed in the Prehearing Order on CPSGMHB Case No. 04-3-0019**

#### **Legal Issue No. 1**

*Does the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 fail to comply with RCW 36.70A.100 because the City of Kent failed to coordinate its actions with the City of Auburn and King County?*

#### **Legal Issue No. 2**

*Does the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 fail to comply with RCW 36.70A.100 because the amendment is inconsistent with the countywide planning policies?*

#### **Legal Issue No. 3**

*Did the City of Kent's adoption of zoning accomplished through Ordinance 3685 fail to comply with 36.70A.100 because the zoning is inconsistent with the countywide planning policies and adopted land use maps?*

#### **Legal Issue No. 4**

*Does the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 fail to comply with RCW 36.70A.100 because the amendment is inconsistent with the comprehensive plans of other jurisdictions with common borders and related regional issues?*

#### **Legal Issue No. 5**

*Did the City of Kent's adoption of zoning accomplished through Ordinance 3685 fail to comply with 36.70A.100 because the zoning is inconsistent with the comprehensive plans of other jurisdictions with common borders and related regional issues?*

#### **Legal Issue No. 6**

*Does the City of Kent's adoption of zoning accomplished through Ordinance 3685 fail to comply with local countywide planning policies adopted pursuant to the GMA with regard to potential annexation areas, by having the City of Kent exercise land use control within the Potential Annexation Area for the City of Auburn?*



**Legal Issue No. 7**

*Did the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 fail to comply with RCW 36.70A.130 because the action was inconsistent with its Comprehensive Plan?*

**Legal Issue No. 8**

*Did the City of Kent's adoption of zoning accomplished through Ordinance 3685 fail to comply with RCW 36.70A.130 because the zoning was inconsistent with its Comprehensive Plan and associated development, and development review, regulations?*

**Legal Issue No. 9**

*Does the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 fail to comply with RCW 36.70A.140 because it did not provide for early and continuous public participation?*

**Legal Issue No. 10**

*Does the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 fail to comply with RCW 36.70A.172 because it failed to include the best available science in determining its land use and zoning designation for the land affected by Ordinance 3685?*

**Legal Issue No. 11**

*Does the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 fail to comply with RCW 36.70A.172 because it failed to give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries in determining its land use and zoning designation for the land affected by Ordinance 3685?*

**Legal Issue No. 12**

*Does the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through ordinance 3685 fail to comply with RCW 36.70A.170 because the City of Kent failed to designate critical areas on the land affected by ordinance 3685?*

**Legal Issue No. 13**

*Does the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 fail to comply with RCW 36.70A.060 because the City of Kent's developmental regulations do not protect critical areas on the land affected by Ordinance 3685?*

**Legal Issue No. 14**

*Does the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 fail to comply with RCW 36.70A.150 because the City of Kent failed to consider the land affected by Ordinance 3685 as useful for public purposes?*

**Legal Issue No. 15**

*Did the City of Kent's adoption of zoning accomplished through Ordinance 3685 fail to comply with 36.70A.020 because the action was arbitrary and discriminatory and failed to protect the property rights of landowners?*

**Legal Issue No. 16**

*Did the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 fail to comply with RCW 36.70A.470 because the action had the characteristics of a project review, was not docketed, and should have been considered under RCW 36.70B?*

**Legal Issue No. 17**

*Did the City of Kent's adoption of zoning accomplished through Ordinance 3685 fail to comply with RCW 36.70A.470 because the action had the characteristics of a project review rezone, was not docketed, and should have been considered under RCW 36.70B?*

**Legal Issue No. 18**

*Did the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 fail to comply with RCW 43.21C.030 because the City of Kent failed to follow state guidelines in addressing environmental issues pertaining to its planning for the land affected by ordinance 3685?*

**Legal Issue No. 19**

*Did the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 fail to comply with RCW 43.21C.031 because the City of Kent failed to appropriately evaluate the environmental impacts of its land use action?*

**Legal Issue No. 20**

*Did the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through ordinance 3685 fail to comply with RCW 43.21C.034 because **the***

*City of Kent inappropriately relied on prior documents to address environmental issues related to the land use designation affected by Ordinance 3685?*

**Legal Issue No. 21**

*Should the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 be conditioned or denied as provided for by RCW 43.21C.060 because the city's action will cause environmental impacts which certain state agencies are empowered to prevent or avoid?*

**Legal Issue No. 22**

*Are Petitioners entitled to a decision from the board that the comprehensive plan amendment and rezone did not properly apply Countywide Planning Policies and the City's Comprehensive Plan?*

## ATTACHMENT – C

### **Legal Issues Retained for Prehearing Briefing in CPSGMHB Case No. 04-3-0019**

#### **Legal Issue No. 1**

*Does the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 fail to comply with RCW 36.70A.100 because the City of Kent failed to coordinate its actions with the City of Auburn and King County?*

#### **Legal Issue No. 2**

*Does the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 fail to comply with RCW 36.70A.100 because the amendment is inconsistent with the countywide planning policies?*

#### **Legal Issue No. 4**

*Does the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 fail to comply with RCW 36.70A.100 because the amendment is inconsistent with the comprehensive plans of other jurisdictions with common borders and related regional issues?*

#### **Legal Issue No. 5**

*Did the City of Kent's adoption of zoning accomplished through Ordinance 3685 fail to comply with 36.70A.100 because the zoning is inconsistent with the comprehensive plans of other jurisdictions with common borders and related regional issues?*

#### **Legal Issue No. 7**

*Did the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 fail to comply with RCW 36.70A.130 because the action was inconsistent with its Comprehensive Plan?*

#### **Legal Issue No. 8**

*Did the City of Kent's adoption of zoning accomplished through Ordinance 3685 fail to comply with RCW 36.70A.130 because the zoning was inconsistent with its Comprehensive Plan and associated development, and development review, regulations?*

**Legal Issue No. 9**

*Does the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 fail to comply with RCW 36.70A.140 because it did not provide for early and continuous public participation?*

**Legal Issue No. 15**

*Did the City of Kent's adoption of zoning accomplished through Ordinance 3685 fail to comply with 36.70A.020 because the action was arbitrary and discriminatory and failed to protect the property rights of landowners?*

**Legal Issue No. 18**

*Did the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 fail to comply with RCW 43.21C.030 because the City of Kent failed to follow state guidelines in addressing environmental issues pertaining to its planning for the land affected by Ordinance 3685?*

**Legal Issue No. 19**

*Did the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 fail to comply with RCW 43.21C.031 because the City of Kent failed to appropriately evaluate the environmental impacts of its land use action?*

**Legal Issue No. 20**

*Did the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through ordinance 3685 fail to comply with RCW 43.21C.034 because the City of Kent inappropriately relied on prior documents to address environmental issues related to the land use designation affected by Ordinance 3685?*

**Legal Issue No. 21**

*Should the City of Kent's adoption of the amendment to its Comprehensive Plan accomplished through Ordinance 3685 be conditioned or denied as provided for by RCW 43.21C.060 because the city's action will cause environmental impacts which certain state agencies are empowered to prevent or avoid?*